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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

UNION RAILWAY COMPANY,
Petitioner,

vs.

J. R. COBB,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

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For purposes of clarity, respondent, J. R. Cobb, will be referred to herein as "plaintiff", his status in the Trial Court; and petitioner, Union Railway Company, will be referred to herein as "defendant", its status in the Trial Court.

OPINION BELOW

The opinion of the Court of Appeals dated May 24, 1963 is reported at **318 Fed. 2d 33**.

QUESTION PRESENTED.

Was it error, under facts of this case, for Trial Court to charge jury as follows:

> "The Court further charges you that if couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically upon impact, you may infer from that fact, but you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act."

STATEMENT OF THE CASE.

It should be borne in mind that plaintiff's case was based upon two (2) counts, namely: (1) violation of Federal Safety Appliance Act, 45 U. S. C., Section 2,[1] and (2) six separate acts of negligence under Federal Employers' Liability Act (FELA), 45 U. S. C., Sections 51 et seq. (Cf. Complaint and Amendment, 4a, 15a). The Trial Court submitted the case to the jury on both counts; and the jury returned a general verdict in favor of plaintiff. No complaint was made in the Court of Appeals and none is here made with respect to the various charges of negligence under the FELA; and no complaint is made, nor is there any showing, that the damages awarded plaintiff were not warranted under either count. In this situation, it would seem, one must assume that the evidence warranted a jury finding against defendant upon all the acts of negligence charged; consequently, no useful purpose will be served in discussing the evidence thereon. Defendant, in its brief, has attempted to detail some of the facts tending to negate its negligence, but fails to point out that the jury verdict has settled all such questions.

The question here presented relates solely to that phase of the case dealing with violation of the Safety Appliance Act. Prior to the time plaintiff was knocked off the end or tenth car, there had been two previous "impacts" between the eighth and ninth cars. The first occurred when plaintiff noticed, earlier in the morning preceding the accident, that the end car, from which he was later

[1] "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

knocked, had brakes locked with wheels sliding when a cut of cars was first switched into "Whiskey Track" (19a, 20a, 28a, 30a). The second "impact" occurred just before plaintiff started to climb up on top of the end car to release the brakes, while plaintiff had his right hand on the grab iron. At that time, both plaintiff and engine foreman Taber testified that they assumed that all of the cars standing on "Whiskey Track" had coupled together successfully (20a, 21a, 62a, 63a).

It was, therefore, on the third "impact" that plaintiff was knocked off the end car.

Defendant contends that there was no proof as to whether any of the knuckles were open or closed prior to the successful coupling attempt when plaintiff was knocked off the end car. The proof, however, showed that plaintiff, being situated upon the end car, was not in any position to observe the condition of the knuckles. The only persons in such a position were defendant's employees, Taber, the engine foreman, Helms and Printup, both switchmen. It was the obligation of the switchmen to check the couplers to see that the same were in open position to couple before signaling a coupling movement (21a, 64a). Taber, the engine foreman, testified with respect to the condition of the couplers immediately before plaintiff was knocked off the end car as follows:—

"Q. You were standing right there?

A. Yes, sir.

Q. And if anybody did open a knuckle, you couldn't help but see it?

A. If anybody opened or adjusted it, I would have seen it.

Q. And you don't know.

A. No, sir."

(64a.)

Switchman Helms testified in considerable detail with respect to the activities of Taber, Printup and himself just before the third "impact" which resulted in plaintiff being knocked off the end car; and although it was his duty as a switchman to check the couplers before signaling the coupling movement, he makes no mention of having opened the coupler in question (70a, 71a, 72a, 73a, 74a). Printup, the other switchman, simply testified:—

"Q. Now, do you remember one way or the other as to whether anybody opened up the knuckle on the eighth car, that is the lead car going back in as you all started back in?

A. I don't know, sir.

Q. You just don't know one way or the other?

A. No, I don't."

(76a.)

The record is clear that the couplers on one of the cars were in the open position just prior to the third "impact" when plaintiff was knocked off the end car (21a, 65a, 77a). Therefore, since the attempt to couple was successful at the time plaintiff was knocked off the boxcar, it necessarily follows that the couplers were open and in a proper position to couple at the time of the two previous "impacts" unless one of the crewmen, namely: Taber, Helms or Printup, physically opened one of the couplers (77a); and none of these men purport to testify that they even checked the couplers before signaling the third "impact." It was the duty of the switchmen and foreman Taber before signaling the last coupling attempt to "check to see if the knuckle is open" (64a).

ARGUMENT.

If the knuckles in question were closed upon the first two unsuccessful coupling attempts by defendant's crew, proof of these facts could only be made by defendant's crewmen Taber, Helms and Printup. Plaintiff proved all necessary facts, within his knowledge, that there had been two "impacts" and two failures to couple on impact prior to his injury. In this situation, plaintiff, even under common law rules,[2] made out a prima facie case calling for an explanation by defendant, and, especially so where it was the affirmative duty of defendant's crewmen to check the couplers before signaling the last coupling operation.

The Court of Appeals in the instant case correctly held as follows:—

> "There were probative circumstances from which the jury could have inferred that the couplers were properly set on the first or second impact, or both, and did not automatically couple upon either but successfully coupled on the third impact."
>
> **(318 Fed. 2d, at p. 36.)**

The charge of the Trial Court, in view of the proof, also followed established federal decisions.

In **Chicago Great Western Railway Co. v. Smith (U. S. C.-A. Eighth, 1955), 228 Fed. 2d 180, at 182,** in discussing the rule, the Court said:—

> "The court in Federal Employers' Liability cases is required to take a liberal view of the scope of permissive inferences open to the jury. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Wil-

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[2] *Kurn v. Weaver*, 25 Tenn. App. 556, 161 S. W. 2d 1005, 1012 (1940); *Western Union Tel. Co. v. Lamb*, 140 Tenn. 107, 112, 113, 203 S. W. 752 (1918).

kerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Louisville & Nashville R. Co. v. Botts, 8 Cir., 173 F. 2d 164, 166; Chicago, R. I. & P. R. Co. v. Lint, supra."

Bearing in mind that defendant, through its employees, Taber, Helms and Printup, alone was in a position to prove that the knuckles on the cars in question were closed at time of first two unsuccessful "impacts", the Court's charge was more favorable to defendant than the proof justified and considerably more favorable to defendant than the charge given by the District Court in the **Affolder Case**, which is, for some strange reason, relied upon by defendant in its brief.

The District Court in the case at bar would have been warranted, it is submitted, in holding as a matter of law that the defendant failed to establish its defense that the knuckles were not properly set for coupling on the first two unsuccessful coupling attempts. Instead, the Trial Judge, in other portions of his charge, told the jury that the burden of proof was upon plaintiff to show that his injuries were proximately caused by defendant's violation of the Safety Appliance Act before there could be a recovery on this phase of the case and that plaintiff was required to carry the burden of proof by the preponderance of the evidence (84a).

A careful reading of the three separate opinions in the **Affolder Case** by the District Court, of Appeals and the Supreme Court clearly shows that any error with respect to the Court's charge in this case was in favor of defendant and not against it. The Court of Appeals for the Eighth Circuit in the **Affolder Case**, at **174 Fed. 2d at p. 488**, said:

"The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury

could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.' **That is the law.**" (Emphasis supplied.)

After setting out the above language, the Court of Appeals, in a case where there was conflicting evidence on the question of whether the couplers were opened, went on to reverse the lower Court's judgment in favor of plaintiff because the Trial Judge, in the opinion of the Court, **deprived the railroad company of its defense that the couplers were not open and in proper position for coupling.** The Supreme Court reversed the Court of Appeals and affirmed the judgment of the Trial Court holding that the Court's charge was sufficiently clear to cover the company's defense. **(339 U. S., at p. 99.)**

Defendant takes the view that the employer is entitled to a strict construction of the Federal Employers' Liability Act and that all inferences should be drawn in its favor in cases of this character, notwithstanding the fact that the Supreme Court has long since held to the contrary.

In **Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916 (1946)**, an employee was found dead near the railroad right-of-way. There was no direct evidence of the cause of death. In ruling on this situation, the Supreme Court said at **90 L. Ed. at p. 923:**—

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of

probative facts to support the conclusion reached does a reversible error appear."

In **Rogers v. Missouri Pacific Rr. Co. (1957), 352 U. S. 500, 1 L. Ed. 2d 493, at p. 500,** the Court said:—

"The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

In the **Rogers Case,** the Court quoted with approval at **1 L. Ed. 2d at p. 500,** the following:—

"Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

"The Trial Judge clearly followed the rationale of the decisions in the **Affolder Case;** and the Court of Appeals correctly so ruled **(318 Fed. 2d at pp. 36, 37).** The jury, in the instant case, was expressly told that there would be no violation of the Safety Appliance Act "if couplers fail to couple automatically because they are not properly set for coupling under the circumstances." The jury was further told that they could infer a violation of the Act for the failure to couple, but were not compelled to do so. The Trial Judge did no more than to advise the jury with respect to a permissible inference that it might make under the proven facts.

Another point should be mentioned. No attack is made upon the correctness of the jury verdict with respect to the six charges of negligence under 45 U. S. C. A., Sections 51 et seq., and no showing made that the result below was not justified under the negligence count. It would seem that since the verdict, as respects one count, is admittedly without error, that the petition for writ of certiorari should, in any event, be denied. Certainly

under the law of Tennessee, where there is a general verdict in favor of plaintiff in a cause of action based upon common law and statutory counts, the verdict will be sustained if either count is free from error.

Rochelle v. L. & N. Rr. Co., 252 Fed. 2d 730, 738 (C. A. 6th, 1958).

This is a case where plaintiff Cobb was injured while trying to conserve railroad property. He was performing work which should have been performed by members of defendant's crew, but which they negligently failed to perform; and his injuries resulted directly from the fact that there were two unsuccessful attempts at coupling by impact. Plaintiff would not have been injured (1) if defendant had not been guilty of negligence, and (2) if the cars in question had coupled upon impact. However, had defendant not been guilty of negligence, as found by the jury, plaintiff's injuries would not have occurred, notwithstanding the violation of the Safety Appliance Act, because had members of defendant's crew performed their duties, plaintiff would not have been put in the dangerous place that he was in at the time he was injured.

CONCLUSION

The Court of Appeals adequately summed up this case as follows:—

> "The jury could have found that the couplers were properly set on the rear car of the eight cars and the front car of the two cars and that they failed to automatically couple by impact due to defect in one or more of the couplers. Or, the jury could have found that the eight cars initially coupled with the two cars and thereafter uncoupled because of a defect in the couplers. In either event, the only issue that would remain was whether the failure to automatically couple upon first impact or the fortuitous

uncoupling of the two cars was the proximate cause of plaintiff's injuries.

[11] The Safety Appliance Act requires that cars remain coupled until freed by some purposeful act after a coupling is effected. O'Donnell v. Elgin, Joliet & E. R. Co., 338 U. S. 384, 389, 70 S. Ct. 200, 94 L. Ed. 187.

[12, 3] If a violation is established, only the proximate cause of the injuries remains as an issue. Carter v. Atlanta & St. A. B. R. Co., 338 U. S. 430, 434, 70 S. Ct. 226, 94 L. Ed. 236. If a violation is a contributory proximate cause of the injury, a jury may find for the plaintiff. Ibid., 435, 70 S. Ct. 229."

(318 Fed. 2d at p. 835.)

There is no conceivable basis, under Rule 19 of this Court, for granting certiorari in this case. The question decided below was based upon decisions which long ago removed any doubt about the correctness of the Trial Court's charge when applied to the facts of the instant case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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